SABAH COMMERCIAL BANKS ASSOCIATION

v.

SABAH BANKING EMPLOYEES' UNION & ANOR.

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[ORIGINATING MOTION NO. 4 OF 1986]
22 SEPTEMBER 1987

ADMINISTRATIVE LAW: *Remedies - Certiorari - Leave - Industrial Court Award - Parties consented to having dispute referred to Industrial Court - Whether precluded from challenging the validity by writ of certiorari.*

In 1985 when the applicant and the 1st respondent entered into negotiations, all the terms and conditions of employment were agreed upon except on one issue and that is on the quantum of retirement benefit. This disputed article on quantum of retirement benefits was made the subject of a joint application to the Minister of Labour who duly referred it to the Industrial Court for adjudication. On 28 December 1985 the Industrial Court made an award to the effect that the applicant shall contribute 15% of the wages to the Employees Provident Fund under the EPF Act 1951. Being dissatisfied with this award the applicant applied for an order of *certiorari* to quash it on the ground that the Industrial Court acted in excess of or without jurisdiction in making its order.

Held:

The Industrial Court had committed an error in law in the course of reaching its decision resulting in its having asked itself the wrong question. The matter that was referred to it by the Minister was plainly on the question of the quantum of the retirement benefits. However the award made affected the applicants' ability or obligation to pay EPF contribution in excess of the statutory rate.

[Application allowed with costs.]

Cases referred to:

Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd. [1984] 1 CLJ (Rep) 305
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304
Mak Sik Kwong v. Minister of Home Affairs Malaysia (No. 2) [1975] 2 MLJ 165
South Asia Firebricks Sdn. Bhd. v. Non- Metallic Mineral Products Manufacturing Employees & Ors. [1980] 2 MLJ 165
Tan Hin Jin v. Prabhulal G. Doshi [1971] 1 MLJ 274
R. v. Furnished Houses Rent Tribunal [1947] 1 All ER 448
Tanjong Jaga Sdn. Bhd. v. Minster of Labour & Manpower & Anor. [1987] CLJ (Rep) 368
National Union of Hotel, Bar & Restaurant Workers v. Casaurina Beach Hotel Sdn. Bhd. [1986] CLJ (Rep) 193
Anisminic Ltd. v. Foreign Compensation Commission [1969] AC 167
In re Racal Communications Ltd. [1980] 3 WLR 181
Hotel Jayapuri v. The National Union of Hotel, Bar & Restuarant Workers [1980] 1 MLJ

Legislation referred to:

Employees Provident Fund Act 1951, ss. 2, 7, (1), (3)
Industrial Relations Act 1967, ss. 13(3), 30(4), (5), 31(3)
Rules of the High Court 1980, O. 53 r. 1(2)

Other source referred to:
Judicial Review of Administrative Action, De Smiths p. 30, 31

For the Applicant - Mr. T.M. Varughese (Dr. Yaacob Merican with him); M/s. Hj. Mohd. Noor, Dr. Yaacob & Ismail
For the 1st Respondent - Mr. K.P. Ghangadharan (Mr. Nobert Yap with him); M/s. Jayasuriya Kah & Co.

JUDGMENT

Abu Mansor Ali J:

The applicant is the Sabah Commercial Banks Association (applicant) and the 1st respondent is the Sabah Banking Employees' Union (union) representing its members. Pursuant to leave granted on 2 May 1986, the applicant herein applied by notice of motion dated 29 July 1986 for an order of *certiorari* to move into this Court for the purpose of it being quashed that part of the Industrial Court Award No. 268 of 1985 ("the award") (paras. 4(a) and (b) on pp. 13 and 14 thereof).

The grounds relied on by the applicant are as set out in para. 3 of the applicant's statement filed pursuant to O. 53, r. 1(2) of the Rules of the High Court 1980. They are:

(a) The Industrial Court acted in excess of or without jurisdiction in making its order as it did in para. 4(a) on p. 13 of the award without having regard to the EPF Act, 1951 generally and to s. 7 of the said Act in particular.

(b) The Industrial Court acted in excess of or without jurisdiction by attempting to interpret the provisions of EPF Act, 1951 and in arriving at a result based on its own computations without any legal basis;

(c) The Industrial Court had erred in law in assuming jurisdiction in the computation of EPF liability and asked itself the wrong questions and failed to take into account whereby it arrived at a conclusion/result which is so unreasonable that no reasonable tribunal would have arrived at, thus acted in excess of or without jurisdiction;

(d) The Industrial Court acted in excess of or without jurisdiction in making its order as it did in that it failed to address its mind to s. 30(4) of the Industrial Relations Act 1967.

The part of the award that applicant seeks to have quashed reads:

(4)(a) With effect from 1 December 1985, the banks shall contribute each month 15% of the wages for that month to the Employees Provident Fund. Such contribution shall be deemed to be inclusive of any employer's contributions to the Employees Provident Fund as may be prescribed by law from time to time.

(b) For the purpose of sub-clause (a) above, "wages" shall have the meaning assigned to it by the EPF Act 1951.

At this stage it may be useful to see what had transpired leading to the award made by the Industrial Court on 26 December 1985 under s. 30(4) of the Industrial Relations Act 1967 (the "Act") binding on the applicant and the union.

On 28 June 1982 the Industrial Court handed down an Award No. 132/82 ("1982 award") on terms and conditions of employment binding on applicant and the union effective for a period from 1 October 1981 to 31 December 1984. When the 1982 award expired the applicant and

the union entered into fresh negotiations with a view to entering into a new agreement. The parties reached agreement on all the terms and conditions of employment except on one issue and that is on the quantum of retirement benefit.

Following the agreement they signed the collective agreement on 11 July 1985 and jointly deposited it in the Industrial Court on 19 July 1985 for cognisance which was duly taken cognisance of on 19 August 1985 as cognisance No. 200/85. The disputed article on quantum of retirement benefits was made the subject of a joint application to the Minister of Labour who duly referred it to the Industrial Court for adjudication. On 28 December 1985 as mentioned the Industrial Court made the award in the terms already hereinafter set out.

The applicant submitted that while acknowledging that they consented to having this dispute referred to the Industrial Court it did not follow that they are precluded from challenging the validity of the award by writ of *certiorari* if it is tainted by the Industrial Court having made the award without or in excess of jurisdiction or the Court did ask the wrong question or in other words it is an *ultra vires* award.

The applicants in their first ground contended that the Industrial Court in making the impugned order in the terms acted outside the scope of its authority. In making the award that applicant shall contribute 15% of wages to the Employees Provident Fund under EPF Act, 1951 ("EPF Act") infringed s. 7(1) of the EPF Act which had stipulated compulsory payment of only 11% of wages and in accordance with the Third Schedule of that Act. Such award as given could not also be read as applicant having made an election under s. 7(3) of the EPF Act as such an election, if it is to be enforced, must have been the result or product of consent of both parties. There was no such consent as it was clear from the start that parties could not reach agreement in the negotiation can hence the matter was referred. At the time it was so referred the parties' positions were the applicant wanted the 15% was to be of basic salary whereas the union wanted 15% of wages as defined in the EPF Act. By this means the Industrial Court had also taken away the parties' right to elect. The applicant further submitted that the award was also illegal in another respect that it was made retrospectively infringing s. 7(3) of the EPF Act. The award was made on 28 December 1985 and was to be effective from 1 December 1985. The applicant submitted that in both respects the excess payment over and above the statutory rates and payment retrospectively the Industrial Court had committed Jurisdictional errors as clearly these matters were beyond the scope of the Industrial Court to make. On these points alone Counsel submitted the applicant had sufficiently shown enough ground for the High Court to grant their application prayed for.

For the Union Counsel confirmed the events that the said award was as a result of a reference by parties to the Industrial Court on the question of retirement benefit. He, however, contended that the 15% payment had its history as the banks in Sabah were already contributing that figure for their officers. Counsel explained that as the award concerned the retirement benefits the Industrial Court made an award which was pegged to the payment of provident fund - 11% was for EPF contribution and 4% was for retirement benefits. In reality it was far from the case of the applicant having to pay an excess of 4% over the statutory rate. The reason the Industrial Court came to such a decision was to be found in para. 8, p. 6 of the award itself. It was made 15% of wages under s. 2 of the EPF Act as "wages" in Sabah and Sarawak in the EPF Act include allowances. This was done to achieve uniformity between the bank workers of both East and Peninsular Malaysia. He also said there was agreement as to the

15% figure, strongly disputed by the applicant, the only difference, he submitted, was whether it is 15% of basic or 15% wages under the EPF Act. If the answer had been 15% of basic the amount would have offended the EPF Act.

The Counsel for the union also stated that it could not be said that the applicant had not elected. The election had already been made by them in the 1982 award. He also complained of the conduct of the applicants on their pursuing of the matter before the Industrial Court. The applicants consented to this matter being referred to and the Industrial Court made an order for payment and no objection was taken to the award, presumably what the union meant by that the applicants did not have recourse before the Industrial Court again thereafter. The union cited De Smiths *Judicial Review of Administration Action*, pp. 30 and 31 of bundle (13), which stated that the Court may have regard to the applicants' conduct and exercise its discretion whether or not to set aside the proceedings. The writer went on to say if a party who had himself initiated the proceedings before a tribunal which was without jurisdiction over the subject matter was subsequently to apply to the Courts to have the proceeding set aside, he may have little hope of being awarded a remedy. He also cited the case of *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd.* [1984] 1 CLJ (Rep) 305 where Wan Sulaiman FJ (as he then was) held the question of the lack of jurisdiction does not arise where there was agreement or implied waiver of jurisdiction on the part of respondent therein and where the company therein also included a proposal not forbidden by s. 13(3) of the Industrial Relations Act in matter of promotion of workers.

All these cases show, the union Counsel submitted, that the Industrial Court had the jurisdiction to decide and make the award as it was a matter of trade dispute. Under s. 30(5) of the Industrial Relations Act, the Industrial Court has an unfettered discretion to make an award in the exercise of its powers to settle disputes in this piece of social legislation. He cited *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 which he submitted shows the Industrial Court has the power to take an award which becomes a contract between parties.

In reply to there first point Counsel for the union submitted, in our present case, the Industrial Court had not decided in excess of jurisdiction in a matter that was properly before it. On jurisdiction he cited *Mak Sik Kwong v. Minister of Home Affairs Malaysia* (No. 2) [1975] 2 MLJ 175 which was approved by the Privy Council in *South Asia Firebricks Sdn. Bhd. v. Non-Metallic Mineral Product Manufacturing Employees & Ors.* [1980] 2 MLJ 165, 168. Counsel says in our present case, he submitted that, even if the Industrial Court had made an error (a fact not admitted by union), that error would not go to jurisdiction. The union also submitted that the applicant was trying to bring in *certiorari* under a cloak of an appeal and this should not be allowed. He cited *Tan Hin Jin v. Prabhulal G. Doshi* [1971] 1 MLJ 274, 275. It would only apply in limited situation and he also cited *R. v. Furnished Houses Rent Tribunal* [1947] 1 All ER 448. He further contended what should be sought to be quashed should be the decision making process and not the decision itself and he cited *Tanjong Jaga Sdn. Bhd. v. Minister of Labour & Manpower & Anor.* [1987] CLJ (Rep) 368.

Since the relevant issue of jurisdiction has been raised the Court therefore is obliged to discuss and decide on it. As already mentioned it is not denied by the applicant that they had submitted to jurisdiction of the Industrial Court to settle the quantum of retirement benefits but, he submitted, as the Industrial Court had made a decision in excess of its jurisdiction, the applicants are entitled therefore to apply to have it set aside.

In the *National Union of Hotel, Bar & Restaurant Workers v. Casaurina Beach Hotel Sdn. Bhd.* [1986] CLJ (Rep) 193 the Supreme Court in the course of discussing jurisdictional error said:

> In proceedings before the Industrial Court a dispute on jurisdiction can occur at two stages. In a complaint under s. 56(1) or a reference under s. 20 or s. 26, a jurisdictional error can occur at the initial stage affecting the complaint or reference itself; and the second occurrence can take place at the final stage affecting the 'award' which by virtue of s. 2 definition includes any decision or order made by the Court under the Act. In *Enesty Sdn. Bhd. v. Transport Workers Union & Anor.*, FCC, No. 200/1984, this Court has referred to the first jurisdictional dispute as 'jurisdictional in the narrow and original sense' as distinguished from 'jurisdictional in the wider sense'. The former is jurisdiction to enter on an inquiry and the latter is jurisdiction to hear the complaint or reference on its merits.

It is all too clear that the allegation, in the present case, that the Industrial Court had committed jurisdiction error in the wider sense.

Following from this, I ask myself what can amount to jurisdictional error in the wider sense? If I am correct, some examples had been given and accepted in a list that is not exhaustive. In the *Anisminic Ltd. v. Foreign Compensation Commission* [1969] AC 167 it was said an error of law can occur in construing an article of agreement and that by such misinterpretation the tribunal had done or failed "to do something in the course of the inquiry which is of such a nature that it is a nullity" (Lord Reid at p. 171) or the Court "having asked themselves the wrong question" as referred to by Lord Diplock at p. 187 in *In re Racal Communications Ltd*, [1980] 3 WLR 181 had rendered its decision a nullity. *In re Racal Communications Ltd.* (*supra*) at p. 187 Lord Diplock spoke of the breakthrough in *Anisminic* [1969] 2 AC 147 resulting in being abolished the difference of errors of law that went to jurisdiction and errors that did not heralding the present position of error now as:

> Any error of law that could be shown to have been made by them (*the administrative tribunals*) (insertion is mine) in the course of reaching their decision on matters of fact or of a administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.

In our present case I asked myself the question has the Industrial Court committed an error of law in the course of reaching its award? In the *National Union of Hotel, Bar & Restaurant Workers v. Casaurina Beach Hotel Sdn. Bhd.* (*supra*) at p. 202 the Supreme Court spoke of the existence of two types of award under the Industrial Relations Act:

> The first is an award on terms and conditions of employment and work actually awarded by the Court arising from a stalemate in collective bargaining between employers and workmen and their trade union... whereas the second type of award is the collective agreement voluntarily entered into between the parties but only deemed to be an award under s. 17.

Obviously the award we are concerned with in the present case is the first type of the award.

As the award is of the first type, in the face of this challenge it can only be retained if it stands the test of it being vires. After considering the arguments of parties on this point discussed I am of the view that the applicant had succeeded in showing me that the Industrial Court had committed an error in law in the course of reaching its decision resulting in its having asked itself the wrong question. The matter that was referred to it by the Minister was plainly on the question of the quantum of the retirement benefits they cannot find settlement. As the learned Counsel had put it plainly the Industrial Court would certainly have been deciding matters properly put before it if only its decision had been wholly on

benefits to be enjoyed by the union members on retirement without adverting to applicants' liability to pay to Provident Fund and if that was done there was nothing that could be said against the award. I agree with the submission of applicants' Counsel that the award in the form it took affected the applicants' liability or obligation to pay EPF contribution in excess of the statutory rate of 11% which can only become payable thereunder and in accordance with the provision of the EPF Act. The payment in excess of 11% can only be sanctioned if the applicants having made a revocable election which election clearly did not happen in our instant case. Since it was not sanctioned by an election the excess can only be illegal payment and without basis whatsoever. In point I can only quote, with respect, Salleh Abas FJ (as he then was) in *Hotel Jaya Puri v. The National Union of Hotel, Bar & Restuarant Workers* [1980] 1 MLJ when he said at p. 109 of the necessity of a basis before there can be creation of an obligation:

> ... I tried to find the basis why compensation is paid at all ... I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.

With respect, I similarly hold that in the present case no basis can be found for that part of the award sought to be inpunged or if at all it is clearly based on an error in law which can in no way stand. There is no necessity for me to discuss other points raised. I, therefore, for reasons given, allow this application in terms as prayed with costs to the applicants.

Also found at [1988] 2 CLJ 124